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IN THE
Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY, CALIFORNIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

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INTEREST OF *AMICI*

In an attempt to assist the Court and to bring to its attention facts and analysis which have not already been presented by the parties, we respectfully submit this *amici curiae* brief. [1]

With over 3,000 members, the California Public Defenders Association (CPDA) is the state's largest association of criminal defense attorneys. CPDA has been a national leader in continuing legal education for defense attorneys for over 26 years, and is one of only two organizations deemed by California to be an "automatically" approved legal education provider. (Calif. Bus. & Prof. Code, §6070, subd. (b).) CPDA attracts many private practitioners as associate members. CPDA's members are involved in both trial and appellate practice. Many of CPDA's clients are on parole or probation, or both. The California courts have granted CPDA leave to appear as *amicus curiae* in well over 30 California cases which culminated in published opinions. CPDA has also served as *amicus curiae* in the United State Supreme Court in cases involving constitutional issues in criminal procedure. (See *California v. Trombetta*, 467 U.S. 479 (1984) [the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense]; *Monge v. California*, 524 U.S. 721 (1998) [the double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency]; *United States v. Knights*, 534

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[1] Pursuant to Rule 37.6, counsel of record Michael C. McMahon states that he is the sole author of this *amici curiae* brief and specifically that no counsel for a party authored this brief either in whole or in part, and that no person or entity other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

U.S. 112 (2001) [a probation search based up reasonable suspicion did not violate the Fourth Amendment]; *Lockyer v. Andrade*, 538 US 63 (2003)[a state court's affirmance of a sentence challenged as cruel and unusual was not objectively unreasonable].)

The second *amicus* on the brief, the Public Defender of Ventura County, California, with his fifty deputies, provides legal representation to thousands of clients each year, who are being prosecuted in the criminal courts. Many of his clients are on parole or probation, or both. The Public Defender's staff has read thousands of arrest reports describing California parole and probation searches and has brought suppression motions challenging them as unreasonable. The Public Defender has an accurate impression of the true nature and extent of these privacy intrusions. He understands the question presented and the scope of its presentation.

Both the California Public Defenders Association and the Public Defender of Ventura County have a substantial interest in the correct resolution of the question presented in this case. Its resolution will determine the rights of our clients and affect our practice. We believe our brief can augment those presented by the parties and illuminate the history and nature of the current controversy.

STATEMENT

1. The historical facts fully and fairly present the question.

Pedestrian, Donald Samson, who was not suspected of any wrongdoing, was fully-searched by a police officer for the sole reason that he was on parole. The officer found methamphetamine and Samson was convicted of possessing the drug. The California courts

rejected Samson's argument that the suspicionless search violated the Fourth Amendment.

These facts present a "clean" record for the resolution of the question presented. Nothing suggests that certiorari was improvidently granted or that the resolution of the question should await some future case.

2. California has a complex system of county and state probation and parole, in which many persons have search terms, but many do not. Law enforcement seeks Fourth Amendment rules that are understandable and easy to apply on the streets, but find none.

Petitioner's brief will contain an excellent overview of the California "state parole" system. *Amici* wish to augment that overview with a description of California's "county parole" system.

California has 58 counties. Although Samson was on state parole, rather than county parole, it is important for the Court to understand that California residents may be on county probation, on county parole, or on a state parole imposed by California, by sister state, or by the federal system. Some of these persons have a diminished expectation of privacy as a result of the terms and conditions of their probation or parole, while many do not. If the particular probation or parole includes no search term, the warrant and probable cause requirements fully apply. As a result, it is not enough for a law enforcement officer to know that a person is on probation or parole. The officer must also know whether the particular probation or parole includes a search term, and the wording of that search term. As always, the "devil is in the details."

In the instant case, the officer who searched Samson may not have understood the difference between

the rights of a state parolee and a state prisoner. The officer appears to have believed that Samson was a state prisoner who had been released from prison "early," on parole. The officer testified that he could search Samson, or other state parolees, without any individualized suspicion because, *"It's a privilege for him to be out there."* J.A. 38. In fact, persons released from California prisons and placed on state parole have already served their entire prison term. Their freedom from custody is not a privilege, but a matter of right. They have "paid their debt to society," and are transitioning to post-prison life. The parole period is an additional period of supervision tacked on to the underlying prison sentence by the operation of state law.

By contrast, persons on county parole have been released early from service of a commitment to county jail. Their parole is completely unrelated to the state prison system. There is, in each California county, a Board of Parole Commissioners. "County parole" is granted pursuant to California Penal Code sections 3074-3088 by those boards. Many of these parolees do not have "search terms" and none are required by law. The only legal requirement is that county parolees must be supervised by a county parole officer. Id., at §3088.

County parole is a "critical" component of the California justice system in every county. "The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for a county to provide for the supervision of parolees, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge." (*Id.*, at §3074, emphasis added.)

County parole is often used to relieve overcrowding in California's numerous jails which are operated by a

county government. California county sheriffs commonly seek to release inmates on county parole to alleviate jail crowding, including inmates the county probation officer might view as unsuitable for county parole. *People ex rel. Deputy Sheriffs' Assn. v. County of Santa Clara,* 49 Cal.App.4th 1471, 1485-1486 (1996) Other persons are placed on county parole as a reward for good work and behavior while in jail, or pressing family needs and emergencies.

The distinction between county and state parole is significant. When California appellate courts state that "every parolee" has a search term, this is inaccurate with regard to the many persons on county parole. See e.g. *People* v. *Lewis,* 74 Cal.App.4th 662, 668 (1999) (in California search conditions "are now automatic, and imposed on every parolee").

The fact that any particular parolee might be on county parole should be common knowledge in the California public safety community. Every judge and every jail inmate is provided with detailed information regarding county parole. Calif. Penal Code §3076, subd. (c). County parole may be imposed for as long as two years following release from the county jail. *Id.*, §3081, subd. (a).

Recent developments have added to the complexity of California's system of probation and parole. The Substance Abuse and Crime Prevention Act of 2000 (SACPA), which was enacted by the voters of California, requires courts to order probation and community-based drug treatment, rather than incarceration, for certain criminal offenders who commit nonviolent drug possession offenses. Calif. Pen. Code, § 1210, subd. (a). The SACPA also mandates that *state parolees* who pick up a new criminal prosecution for a non-violent drug offense not involving sales, may be entitled to a treatment-oriented *county probation* if they are convicted. Such persons are simultaneously supervised by a state

parole officer, a county probation officer, and treatment providers. This organized program of supervision will routinely include random drug-testing, pursuant to the supervisors' protocols. Reasonable estimates are that approximately 10% of persons entering this new drug treatment-based county probation are already on state parole. And, subject to certain narrow exceptions, state parole may not be suspended or revoked for commission of a nonviolent drug possession offense or for violating any drug-related condition of parole.

The sheer complexity of California's system of state parole, and county probation and parole, presents a problematic situation for the peace officer on the street and those charged with the task of training them on Fourth Amendment principles. In which situations must a search be based upon probable cause? When is reasonable suspicion sufficient?

California's courts have added to this confusion by assuring officers that all parolees may be searched without any quantum of individualized suspicion. If this is true, may a county probationer (or at least one with a search term) also be searched at the whim of the officer?

California looks to this Court for much needed guidance.

SUMMARY OF THE ARGUMENT

A constitutional program of parole supervision might include a component of random breath, blood, and urine testing, inspections of the residences of parolees, and other privacy intrusions, which are not based upon individualized suspicion.

Currently, California has no incentive to develop such a program. A series of flawed opinions from the California Supreme Court has left the authorities with the impression that parolees have a diminished expectation of privacy, one that has been diminished into oblivion. Parolees have become fair game for full-scale searches by any officer of any law enforcement agency, without limitation. Any evidence seized in those searches is most often used in new felony prosecutions.

Although the entire, standardless scheme is arbitrary and capricious, California courts promise to suppress the evidence only if the parolee can prove *the particular search* was arbitrary, capricious, or undertaken for harassment. A search undertaken merely because the person is a parolee will not result in suppression. As a practical matter, this safeguard is illusory.

A balancing of interests dictates that ordinary law enforcement searches of parolees should be based upon some quantum of individualized suspicion. A requirement of reasonable suspicion, at least for searches conducted by officers in the field, is constitutionally appropriate. Parole supervision and public safety will not suffer in any significant degree from such a requirement. Law enforcement will actually benefit by a return of their attention to subjects who appear suspicious.

The judgment of the California Court of Appeal should be reversed.

ARGUMENT

I. California's Fourth Amendment jurisprudence has been misguided since its 1994 decision in *In re Tyrell J.* Inspired by "sloppy analysis," its 1998 decision in *People v. Reyes* extends the "special needs" exception to full-scale searches conducted in the course of ordinary law enforcement.

Amici contend that California's jurisprudence regarding searches of probationers and parolees strayed far off course eleven years ago. The court's failure to acknowledge and rectify that mistake has hampered its analysis in more recent cases. Law enforcement, privacy rights, and public safety have all suffered.

In 1994, the California Supreme Court concluded that an officer may search a minor who is subject to a probation search condition without reasonable suspicion that the minor has violated the law or any condition of the probation *even if the searching officer is unaware of the suspect's probationary status. In re Tyrell J.*, 8 Cal.4th 68, 78 (1994) (*Tyrell J.*).

In *Tyrell J.*, a police officer had searched the person of a juvenile without knowing the minor was on juvenile probation with a search condition, and found a bag of marijuana in one of his pockets.

But not every appellate victory for the prosecution proves to be a real benefit for law enforcement. *Tyrell J.* was wrongly decided and misled law enforcement officers, prosecutors, and judges, regarding traditional Fourth Amendment principles. *Tyrell J.* meant that a search could be justified based upon facts learned *after* the search was completed.

The methodology used to arrive at the result in *Tyrell J.* was flawed. The majority opinion in *Tyrell J.* determined that the search was not a violation of the

Fourth Amendment by considering "the primary purpose of the Fourth Amendment exclusionary rule." *Id.*, at p. 89.

The question of whether the search of the minor's pocket violated his Fourth Amendment rights should properly have been resolved before (or at least separately from) any discussion of whether the exclusionary sanction was appropriate in that context. The two questions are inherently separate issues, each requiring separate analysis.[2] While it is entirely possible the California court might have arrived at the same result without confusing the two issues, the court's flawed analysis creates serious doubts regarding its ultimate conclusion.

For the past eleven years, the California criminal justice system has suffered as a result of this decision. Many law enforcement officers have applied the rationale of *Tyrell J.* to searches of adults who may later be discovered to be on either probation or parole. *Tyrell J.* encourages law enforcement to search first and ask questions later. When questions do precede the search, the first question is invariably, *"Are any of you on probation or parole."* By this diversion of police attention from the observation of facts which might support an inference of suspicion of wrongdoing, the quality and character of criminal investigation has suffered.

Despite controversy, confusion, and criticism, the California Supreme Court has declined to frankly overrule its decision in *Tyrell J.* See, most recently, in

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[2] If the search of Samson was unreasonable, the exclusionary rule should apply because the evidence was used to obtain a criminal conviction. Any further discussion of the deterrent purpose of the exclusionary rule is both unnecessary and unhelpful in determining whether the search was unreasonable.

People v. Sanders 31 Cal.4th 318, 335, fn. 5 (2003) (*Sanders*).

A few days before the writing of this brief, the California Supreme Court let stand a decision by the Court of Appeal upholding a search undertaken solely because the officer knew that the subject was on "parole." At the time of the search, the officer did not know whether the person he was searching was on a California state parole with a search term, or on a grant of parole from another agency which did not include a search term. *People v. Revelles*,. B180419, [nonpub. opn] (review den., November 16, 2005, S137742.) Although an order denying review creates no precedent, the Court of Appeal's underlying decision on the merits shows the lingering effects of the *Tyrell J.* approach: the use of information learned only after a search, to establish its constitutionality. Despite the erosion of *Tyrell J.* in the *Sanders* decision, the California courts remain confused. Compare *In re William R.*, 133 Cal.App.4th 1004 (10/27/2005) [*Sanders* did not overrule *Tyrell J.*] with *In re Joshua J.*, 129 Cal.App.4th 359 (5/12/2005) [*Sanders* "dismantled the foundation and cornerstones of *Tyrell J.*" so that "there is no presently binding Supreme Court authority" on the issue].

In 1998, the California Supreme Court was confronted with the same question presented to this Court in the instant case. In *People v. Reyes*, 19 Cal.4th 743 (1998) (*Reyes*) a four-to-three majority of the California Supreme Court overruled *People v. Burgener*, 41 Cal.3d 505 (1986) in which it had held that any warrantless search of a parolee must be justified by a reasonable suspicion that the parolee has violated, or is planning to violate, the law or a parole condition. *Reyes*, at pp. 746, 753-754. The *Reyes* majority held that "a parole search may be reasonable despite the absence of particularized suspicion." *Id.* at p. 753.

In *Reyes*, the California Supreme Court relied upon two cases from this Court to justify the suspicionless searches of parolees by officers in the field. But its reliance on these cases is misplaced.

In *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), the design of the United States Customs Service's urine testing program was clearly separate and distinct from the ordinary needs of law enforcement:

- The results of the tests could not be used in a criminal prosecution of the employee without the employee's consent. *Id.*, at p. 666, and,
- Testing was not subject to the discretion of officials in the field. *Id.*, at p. 667.

In the instant case, Samson, a state parolee, was searched in an exercise of unfettered discretion by a city police officer in the field. The seized evidence was used in a criminal prosecution of Samson without his consent. Neither of these important distinctions was discussed by the California court.

The second case cited by the *Reyes* court was *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) *Skinner* is readily distinguishable, however, because there:

- the privacy interests implicated by the searches were "minimal" and the searches were limited to blood, breath, and urine workplace testing of employees performing safety-sensitive tasks, and,
- the employees were already subject to medical and physical fitness examinations.

In the instant case, the searches at issue are full-scale searches far more diverse and intrusive than the blood, breath, and urine testing presented in *Skinner*.

The state parolees are not otherwise subject to the medical and physical fitness examinations, as were the railway employees.

The California court has persisted in conflating the initial question of whether the Fourth Amendment has been violated, with the secondary question of whether application of the exclusionary rule is an appropriate sanction for the violation. See e.g. *People v. Robles,* 23 Cal.4th 789, 799-800 (2000); *Sanders, supra,* 31 Cal.4th at pp. 324, 334; and conc. opn., J. Brown, at p. 340, complaining of the recurring "sloppy analysis."

This case presents the High Court with an opportunity to provide the California Supreme Court with some needed guidance and free it from the muddled thinking exhibited in *Tyrell J.* and its progeny. *Amici* hope that this guidance will restore the attention of law enforcement upon the observation of specific and articulable facts supporting an inference of suspicion of misconduct. The limited resources of the police can then be re-focused on those who appear to be involved in wrongdoing, rather than scattered among thousands of law-abiding persons, who happen to be on probation or parole. *Amici* contend that public safety will not suffer by the restoration of traditional Fourth Amendment principles.

II. A "special needs" balancing of interests dictates that law enforcement searches of parolees should be based upon some quantum of individualized suspicion. A proper balance is struck with a requirement that such searches be based upon reasonable suspicion, the lowest objective standard known under the law.

"[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion

on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

Amici suggest that the balancing of interests here dictates that law enforcement searches of parolees should be based upon reasonable suspicion, the lowest objective standard known under the law.

II a. California's interests in monitoring and supervising parolees are legitimate and significant.

The government's interests in monitoring and supervising parolees are great. California has articulated those interests in some detail. One interest is the "successful reintegration of the offender into society and ...positive citizenship." Cal. Pen. Code, § 3000(a)(1). Others are the "supervision of and surveillance of parolees" and "to assist parolees in the transition between imprisonment and discharge...." *Id.*

Parolees have been convicted of at least one crime and are at risk of re-offending. In the instant case, Mr. Samson was in possession of some two grams of a methamphetamine. This was a new violation of law and of the conditions of parole. It is likely, however, that most suspicionless parole searches produce nothing more than humiliation and delay for those parolees who have remained "above suspicion." (The courts never see those cases, because no arrest is made nor charges filed. They are nevertheless, a part of the intrusion upon privacy interests which must go onto the other end of the balancing scale.)

The state's interest in supervising parolees is similar to its interest in supervising probationers. As explained earlier, many people are simultaneously on both parole and probation, and, the lines between the two have been blurred.

The creation of different rules of reasonableness governing parole and probation searches may or may not be appropriate. That is a question that need not be decided in the instant case. But searches of both parolees and probationers which, as is often the case, result in the discovery of small quantities of drugs will often *not* result in a revocation of that parole or probation under California's Substance Abuse and Crime Prevention Act of 2000.

However, California law enforcement officers are well aware that such evidence may be used in the prosecution of a new criminal case. Under California law, such new offenses are invariably filed as felonies, rather than misdemeanors, particularly where the defendant is already on probation or parole.

Under current policies, the state's legitimate interests are great, but are virtually identical to its general interest in ordinary law enforcement.

II b. The searches by officers in the field are frequent, unlimited, full-scale searches and the evidence seized is often used in new felony prosecutions. Parolees, and those persons in propinquity to them, are detained, inconvenienced, and embarrassed.

The parole searches at issue are full scale searches. Parole (and probation) search intrusions are far more than minimal. At the end of 2003, some 4.8 million adults were on probation and parole, compared with approximately 2.1 million adults in jail or prison. See *Trends in Probation and Parole in the States*, William D. Burrell, American Probation and Parole Association. These searches directly or indirectly affect the rights of those persons associated in some way with the parolee.

The parole searches include searches of homes shared with friends and family, cars shared with co-

workers, searches conducted in full public view, searches following transport to a police station, body cavity searches, and blood draws for drug and alcohol testing. The searches infringe upon the rights of non-parolees. For example, if a car driven by a parolee is stopped for a search, all of the passengers are also effectively stopped and detained.

Currently, California's parole searches are of unlimited intrusiveness. This weighs heavily in the balancing process, when compared to the "negligible" privacy-related significance of school urine sampling conducted with a discreet protocol. *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 658 (1995).

Given the extremely intrusive nature of the parole searches and the use of the seized evidence in new criminal prosecutions, *amici* contend that the invasion of privacy rights is significant.

II c. Use of the familiar "reasonable suspicion" standard is a practical alternative. It allows an immediate, forceful response to any appearance of misconduct. The state's interests are not placed in jeopardy by a requirement of individualized suspicion.

Searches based upon reasonable suspicion are a practical alternative to suspicionless searches. Parolees will soon learn that if they conduct themselves in a law-abiding manner and remain free of ambiguous conduct or suspicious situations, they will not be hassled or subject to arbitrary searches, at least not by law enforcement officers with no nexus with parole supervision. The very purpose of parole is to encourage just such good behavior.

Use of a reasonable suspicion standard actively encourages compliance with both the letter and the spirit of parole regulations. Although the warrant and probable-cause requirement is impracticable in the

context of parole supervision, a requirement of reasonable suspicion is not, at least not when the searches are conducted by ordinary law enforcement as opposed to an independent parole supervision program.

Although some argue that suspicionless searches of parolees and probationers promote public safety, this premise should commence, rather than conclude, our analysis.

This Court has refused to approve routine privacy intrusions in other contexts where officer safety was the legitimate governmental interest sought to be promoted. See *Maryland v. Buie*, 494 U.S. 325 (1990) (rejecting the state's claim that a protective sweep of a home is valid without reasonable suspicion when the area may contain someone who is a threat to the police; a protective sweep of a home is permissible only where there is reasonable suspicion that the area to be swept harbors an individual posing a danger to those on the arrest scene); see also *Richards v. Wisconsin*, 520 US 385 (1997) (rejecting a blanket rule permitting police to effectuate an unannounced entry of a home whenever they possess a search warrant for narcotics).

Constitutional rights often mean that government may not pursue it interests in the most economical and efficient manner. The reasonable way of doing business is not always the fastest or the least expensive. The Framers surely must have appreciated that protecting these rights would often create some resulting inconvenience, some delay, or some additional costs.

When performing a balancing of interests, the Court cannot discard the right to individual privacy merely because protecting it may result in some inconvenience to the government's legitimate pursuit of other interests.

Can the Court fairly conclude that requiring individualized suspicion for searches of parolees by law

enforcement would have a significantly detrimental effect on their supervision or would it render their supervision impracticable?

Amici contend that the important governmental interests furthered by the parole searches will not be placed in jeopardy by a requirement of individualized suspicion.

III. Any regulatory program which includes suspicionless searches of parolees or probationers should be free of pervasive entanglement with ordinary law enforcement.

Conceivably, the California legislature and parole authorities could develop a reasonable, structured, program to monitor and supervise parolees, which included a component of suspicionless searches.

Such a program might include a component of random breath, blood, and urine testing, inspections of the residences of parolees, and other privacy intrusions, which are not based upon individualized suspicion. Such a program would need to be less arbitrary and capricious than the current unstructured policy, which leaves everything to the unfettered discretion of every law enforcement officer in the field.

A constitutional program would need to look much more like the structured programs at issue in *Treasury Employees v. Von Raab, supra,* or *Skinner v. Railway Labor Executives' Ass'n., supra.* Neither of those programs was designed so as to create a pervasive entanglement with ordinary law enforcement. In those programs, the primary consequences of the searches were not new criminal prosecutions. In those programs, the decision to search was not made by a law enforcement officer in the field. In those programs, the searches were limited in scope. The privacy invasions were minimal.

California needs a new, well-conceived program for parole searches. But the state will have no incentive to develop such a program until this Court clarifies that California's current policy is unreasonable.

Finally, *amici* believe that any attempt to design a program of suspicionless searches for parolees should be left, in the first instance, to state authorities. This Court will have the last word; it need not have the first.

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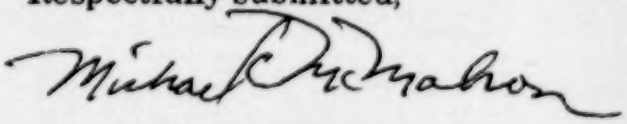
CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,



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